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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 363

THE ARROW-HART & HEGEMAN ELECTRIC COMPANY, petitioner

v.

FEDERAL TRADE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 1059–1067) is reported in 65 F. (2d) 336. A *per curiam* opinion (R. 1055–1058) with respect to petitioner's motion to amplify the record and to respondent's motion to strike certain portions of the petition for review is reported in 63 F. (2d) 108.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 6, 1933. (R. 1068.) Peti-

tion for certiorari was filed August 19, 1933, and was granted December 11, 1933. (R. 1069.)

Jurisdiction of this Court rests on Section 11 of the Clayton Act, c. 323, 38 Stat. 730, 735 (U.S.C., Title 15, Sec. 21) and on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The questions presented are:

(1) Whether there is sufficient evidence to support the Federal Trade Commission's finding that the effect of the acquisition by Arrow-Hart & Hegeman, Inc., in October, 1927, of the voting stock of two manufacturing corporations, The Arrow Electric Company and The Hart & Hegeman Manufacturing Company, may be to substantially lessen competition between the two manufacturing corporations.

(2) Whether the Federal Trade Commission, in order to hold such stock acquisition a violation of Section 7 of the Clayton Act, was required to find any injury to the public other than the probable substantial lessening of competition between the two manufacturing corporations.

(3) Whether the Federal Trade Commission had power under the Clayton Act to order petitioner to divest itself of the assets of one or the other of the manufacturing corporations, where, after the issuance by the Commission of a complaint under Section 7 against Arrow-Hart & Hegeman, Inc.,

that company by means of its unlawful control over the voting stocks of the manufacturing corporations, caused petitioner to be created by the consolidation of these two corporations.

STATUTE INVOLVED

The pertinent provisions of Sections 7 and 11 of the Clayton Act are set forth in Appendix A, *infra*, pp. 53–56.

STATEMENT

On March 3, 1928, the Federal Trade Commission issued a complaint against Arrow-Hart & Hegeman, Inc. (hereafter referred to as the original respondent), charging that it had violated Section 7 of the Clayton Act by acquiring on or about October 10, 1927, all of the common voting stock of two competing manufacturing companies, The Hart & Hegeman Manufacturing Company and The Arrow Electric Company. (R. 3–9.) An answer was filed on September 7, 1928. (R. 12.) Thereafter, on December 6, 1928, the original respondent transferred the common voting stock of one of said manufacturing companies to a newly created holding company, and the common voting stock of the other manufacturing company to a second newly created holding company; steps were taken to dissolve the original respondent; and on December 31, 1928, the petitioner, The Arrow-Hart & Hegeman Electric Company was formed by the consolidation of the two manufacturing companies and the two newly formed holding com-

panies. On June 29, 1929, the Commission issued a supplemental complaint joining the petitioner as respondent. (R. 24–41.) The supplemental complaint was answered by petitioner on October 14, 1929. (R. 42.)

The Commission, after protracted hearings before an examiner, found, on July 6, 1932 (R. 230), one Commissioner dissenting (R. 264–266), that the original respondent's acquisition of the common stock of the two manufacturing companies constituted a violation of Section 7 of the Clayton Act in that the effect thereof has been, is, and may be to substantially lessen competition between the two manufacturing companies in the sale and distribution of electrical wiring devices in interstate commerce, to restrain interstate commerce in electrical wiring devices in various sections or communities and to tend to create a monopoly in the electrical wiring devices industry (R. 258); that the transfer by the original respondent of the said common stock to the newly created holding companies was not such a divestment as to constitute a compliance with the Clayton Act (R. 258); that the course of action of the original respondent in organizing petitioner was not taken to restore the competition which had previously existed between the two manufacturing companies, but was in part for the purpose of avoiding a claim for income tax by the United States, and in part an artifice and subterfuge designed to evade the provisions of Sections

7 and 11 of the Clayton Act, and to perpetuate the elimination of all competition which had existed between the two manufacturing companies prior to October 10, 1927 (R. 258–259). It concluded that the acquisition by the original respondent of the common stock of the two manufacturing companies "and the continued ownership and/or control, and the voting of said stocks by the said original respondent, which culminated in the organization of" petitioner and the acquisition by petitioner, through merger, of the common stocks and of the assets of the two manufacturing companies, constituted a violation of Section 7 of the Clayton Act. (R. 260.) It ordered petitioner to divest itself of the stock and assets of one or the other of the two manufacturing companies. (R. 261–263.)

A petition to review the Commission's order was filed in the Circuit Court of Appeals, and that court affirmed the Commission's order, one Judge dissenting upon the ground that the order exceeded the Commission's jurisdiction. (R. 1059–1067.)

In October, 1927, The Hart & Hegeman Manufacturing Company of Hartford, Connecticut, organized in 1891, was engaged in the manufacture, sale and distribution throughout the United States of a full line of electrical wiring devices, generally known as "shelf goods," to jobbers and other dealers. (R. 310–311, 350, 393–411, 462–472; Com. Ex. 30, Resp. Ex. 36.) Its domestic sales in 1926 were $3,145,068, and in 1927 were $3,147,178. (R. 476.) Its total volume of sales, both export and

domestic, were, in 1926 $4,153,000, and in 1927 $4,537,000. (R. 927.)

In October, 1927, The Arrow Electric Company, of Hartford, Connecticut, in operation since 1905, also manufactured, sold and distributed "shelf goods" throughout the United States to electrical jobbers and other dealers. (R. 415–417, 503–531; Com. Ex. 30, Resp. Ex. 36.) Its total volume of sales in the United States in 1926 was $3,825,712, and in 1927 $3,300,416. (R. 530.) Its total volume of sales, both export and domestic, in 1926 was $4,012,000, and in 1927 $3,849,000. (R. 927.)

The electrical wiring devices manufactured and sold by the two companies and generally known in the trade as "shelf goods" were similar in design, quality and price, and were described in their respective catalogues under various schedule numbers recognized as standard descriptions by the industry and by the United States Department of Commerce. (R. 310–311, 393–411, 415–417, 484–497, 595–597, 605, 670; Com. Ex. 67, 88.) In 1927 approximately 59 percent of the business of The Hart & Hegeman Manufacturing Company, consisting of "shelf goods," was competitive with all of the business of The Arrow Electric Company.[1] (R. 559–560.)

[1] The balance of the business of The Hart & Hegeman Manufacturing Company consisted principally of the sales of electrical switches and other devices manufactured to the order of customers for use in appliances; The Arrow Electric Company sold only a limited number of items in this field. (R. 238–239, 540–543.)

Both companies maintained branch sales offices or commission men in Boston, New York City, Baltimore, Chicago, and San Francisco, serving practically the same territories. (R. 312, 417, 418, 502–504.) Their respective sales from such branches for the years 1926 and 1927 were as follows (R. 398, 412, 464, 469, 476, 508, 517, 520, 527, 530):

1926

Cities	Hart & Hegeman Mfg. Co.	Arrow Electric Co.
Boston	$315,911	$483,933
New York	1,010,373	1,102,680
Baltimore	144,163	240,517
Chicago	1,368,941	1,524,220
San Francisco	169,254	462,989

1927

Boston	$292,227	$414,842
New York	927,747	957,372
Baltimore	92,269	140,751
Chicago	1,374,379	1,392,503
San Francisco	174,446	397,400

Both companies sent out salesmen from the branch offices, chiefly as missionary men, to call upon consumers of electrical wiring devices for the purpose of interesting them in their respective products. (R. 342, 503.) Approximately 25 percent to 30 percent of the customers of each company were common customers. (R. 481, 504–531; Com. 89–93.)

The combined volume of sales of both companies during 1927 was in excess of 25 percent of the total volume of sales in that year of all the manufacturers of electrical wiring devices in the United States. (R. 875, 927.) At the time the testimony was taken

before the examiner (1931) the total volume of sales of petitioner exceeded the volume of sales of parallel lines of electrical wiring devices of any of its competitors. (R. 881–896.)

Shiras Morris, who with his family controlled the common stock of The Hart & Hegeman Manufacturing Company and was its president and treasurer, died on February 2, 1927. (R. 350–351, 962–963.) Prior to his death Morris had contemplated a merger with the Arrow Electric Company. (R. 272–273; Com. Ex. 1, 7, 18.) Upon Morris' death Samuel P. Williams became president and treasurer of the company. (R. 270; Com. Ex. 6.) Early in July, 1927, he entered into negotiations with Edward R. Grier, then vice president of The Arrow Electric Company, for the organization of Arrow-Hart & Hegeman, Inc., the original respondent. (R. 285.) At that time the outstanding capital stock of The Hart & Hegeman Manufacturing Company was $200,000 common (consisting of 8,000 shares of a par value of $25) and $300,000 preferred. (R. 274, 307.) Prior to June, 1927, the outstanding capital stock of The Arrow Electric Company amounted to $750,000, represented by 30,000 shares of common stock of a par value of $25, which was controlled by Edward R. Grier and his associates. (R. 419, 932.) In June, 1927, The Arrow Electric Company issued $2,000,000 preferred stock to its common stockholders, who sold it to a syndicate which in turn sold it to the public. (R. 932–933.) On August 6, 1927, an agreement

was entered into between the common stockholders of the two companies, providing for the readjustment of the capital structure of The Hart & Hegeman Manufacturing Company as a preliminary step in the organization of the original respondent. (R. 288, 295; Com. Ex. 10.) Pursuant to this agreement the common stock of The Hart & Hegeman Manufacturing Company was increased from 8,000 shares of a total par value of $200,000 to 20,000 shares of a total par value of $500,000, the new shares being issued as a stock dividend to the common stockholders, and a new issue of $1,333,000 preferred stock was made, of which $800,000 was issued to the common stockholders as stock dividends, and the balance was sold to obtain funds to retire the old issue of $300,000 preferred and a preferred stock issue of a subsidiary company. (R. 301, 307; Com. Ex. 10, 11, 19, 23, 24.) The entire new issue of preferred stock of The Hart & Hegeman Manufacturing Company was sold to the public by the same syndicate which had handled the sale of the preferred stock of The Arrow Electric Company. (R. 933–936.) The preferred stock issues of both companies were non-voting except in the event that dividends were not paid thereon for six successive quarters. (R. 234, 235; Com. Ex. 23, 24, 52.)

Arrow-Hart & Hegeman, Inc., the original respondent, was organized on October 6, 1927 (R. 302–303; Com. Ex. 31, 32, 33, 34), with a capital stock of $2,000,000 represented by 200,000 shares

of common stock of a par value of $10 each (R. 307; Com. Ex. 31). On October 10, 1927, it acquired all of the common stock of The Hart & Hegeman Manufacturing Company, in exchange for 80,000 shares of its stock, and all of the common stock of The Arrow Electric Company in exchange for 120,000 shares of its stock. (R. 307; Com. Ex. 34, 36.) Samuel P. Williams became vice president and treasurer of the original respondent and also continued as president and treasurer of The Hart & Hegeman Manufacturing Company. (R. 308; Com. Ex. 30.) Edward R. Grier became president of the original respondent and continued as vice president and general manager of The Arrow Electric Company, of which company he became president on January 20, 1928. (R. 415, 423; Com. Ex. 30.) Benjamin C. Perkins became vice president and secretary of the original respondent and continued as secretary and assistant treasurer of The Arrow Electric Company. (Com. Ex. 30.) Monroe Guett became vice president of the original respondent and continued as vice-president of The Hart & Hegeman Manufacturing Company. (Com. Ex. 30.) At a meeting of the board of directors[2] of the original respondent on October 10, 1927, persons were designated who, as agents of the original respondent, should be qualified on its behalf to act as directors of the two manufacturing companies.

[2] Two directors of each manufacturing corporation became directors of the original respondent. (R. 307.)

(Com. Ex. 36.) At a meeting of the board of directors of the original respondent on January 5, 1928, Grier was authorized for a period of five years to vote The Arrow Electric Company stock, and Williams was given a like proxy to vote The Hart & Hegeman Manufacturing Company stock. (Com. Ex. 39.)

The Commission's complaint against the original respondent was issued on March 3, 1928, and an answer was filed on September 7, 1928. On November 10, 1928, the directors of the original respondent voted to recommend its dissolution (R. 77), and on the same day a letter was issued to its stockholders signed by Edward R. Grier, president, and Samuel P. Williams, vice president, stating that the dissolution of the original respondent had been recommended by counsel "to meet the recent criticism of the Federal Trade Commission" and that it was expected that distribution would be made in kind of the shares of common stock of the two manufacturing companies, constituting the entire assets of the original respondent, so that each stockholder of the original respondent would receive shares of the common stock of either one or both of the manufacturing companies. (R. 61; Com. Ex. 44.) There was enclosed with the letter a notice of a special meeting of stockholders to be held December 10, 1928 (R. 60; Com. Ex. 44) and a proxy which the stockholders were urged to sign and return as soon

as possible (R. 61–62; Com. Ex. 44). The letter read in part as follows (R. 62):

> We believe that upon distribution of this company's assets the directors of The Arrow Electric Company and of The Hart & Hegeman Manufacturing Company will propose to the stockholders of each company an agreement of consolidation of these two companies. Further details will be sent you upon the conclusion of the liquidation of Arrow-Hart & Hegeman, Inc. for your approval.
>
> Much progress has been made in efficiency and economy through the organization of your company and more, we are confident, can be accomplished by actual merger and consolidation of the two companies, viz: The Arrow Electric Company and The Hart & Hegeman Manufacturing Company.

A special meeting of the board of directors of the original respondent was held on November 30, 1928, and a general plan of reorganization was adopted. (R. 86–91; Com. Ex. 45.) This plan was as follows: (1) the original respondent, Arrow-Hart & Hegeman, Inc., would transfer the common stock of The Arrow Electric Company to a new Arrow company to be known as The Arrow Manufacturing Company, in exchange for all of the capital stock of the latter, and would make a similar transfer of the common stock of The Hart & Hegeman Manufacturing Company to a new Hart & Hegeman company to be known as The H.

& H. Electric Company, in exchange for all of the capital stock of the latter, each stockholder of the original respondent to receive for each share of stock one share in each of the new companies; (2) when such exchange of shares had been consummated the original respondent would be dissolved at the meeting already scheduled for December 10, 1928; and (3) the four corporations then in existence, viz., the two manufacturing companies and the new Arrow and Hart & Hegeman companies would be merged or consolidated under an agreement to be ratified by December 31, 1928, whereby the consolidated company would issue preferred stock equal to the combined preferred stock issues of the two manufacturing companies so that each preferred stockholder in these two companies would for each share held receive one share of the preferred stock of the consolidated corporation and whereby the consolidated company would issue common stock equal to the common stock of the original respondent, so that one share of the common stock of the consolidated company would be issued in exchange for a unit of one share of the new Arrow company and one share of the new Hart & Hegeman company, "the net result on common stock being that the stockholders of Arrow-Hart & Hegeman Incorporated will ultimately hold one share of the merged or consolidated corporation, of the par value of $10 for every one share of Arrow-Hart & Hegeman Incorporated now held by

them." (R. 87–90.) At this meeting the board of directors voted to call a special meeting of the stockholders for December 6, 1928 to consider and adopt the plan of reorganization, and approved a form of letter to be sent to the stockholders and a form of proxy, running to the same persons named in the proxy for the meeting of stockholders scheduled for December 10, 1928. (R. 90–91.)

On the same day, November 30, 1928, steps were taken to organize the two new companies, The Arrow Manufacturing Company and The H. & H. Electric Company. (R. 116–118, 158–160.) The organization of both companies was completed on the following day, December 1, 1928 (R. 119–132, 161–174), and on that day meetings of the stockholders of the two companies were held at which the plan of reorganization was approved. (R. 133–134, 175–177.) In the case of each new company two[3] of the three persons who became its incorporators, directors, officers and original subscribers were directors and officers of Arrow-Hart & Hegeman, Inc., the original respondent, and as directors had voted at the meeting of November 30, 1928, to adopt the general plan of reorganization. (R. 86, 118, 126, 131, 133, 160, 168, 173, 174.) Edward R. Grier, president of the original respondent, became president and treasurer of The Arrow Manufacturing Company and subscribed to 398 of the

[3] They also became officers and directors of petitioner upon its formation, *infra*, p. 20.

400 shares of stock of this company which were outstanding at the time of the stockholders' meeting on December 1, 1928, and at this meeting voted the shares held by him in favor of the plan of reorganization. (R. 131–134.) Samuel P. Willams, vice president and treasurer of the original respondent, became president and treasurer of the H. & H. Electric Company and subscribed to 398 of the 400 shares of stock of this company which were outstanding at the time of the stockholders' meeting on December 1, 1928, and at this meeting voted the shares held by him in favor of the plan of reorganization. (R. 173–176.)

On December 1, 1928, the letter which had been approved at the meeting of the directors of the original respondent on November 30, 1928, was sent to its stockholders under the signature of Edward R. Grier, president, and Samuel P. Williams, vice president. (R. 63–66; Com. Ex. 46.) It stated that it was supplemental to the letter of November 10, 1928. It outlined fully the plan of reorganization adopted at the meeting of the Board on November 30, 1928, stating that "these separate steps, as a part of one plan of reorganization" were desirable not only to meet the criticism of the Federal Trade Commission, but to bring the reorganization within the provisions of the Revenue Act of 1928 so that the exchange of shares would involve no tax to any stockholder. (R. 65.) The prompt cooperation of the stockholders was urged, and formal

notice of a special meeting of the stockholders to be held on December 6, 1928, was enclosed, together with the form of proxy which had been approved at the directors' meeting of November 30, 1928, authorizing the persons named to vote in favor of the plan of reorganization, to receive on behalf of the stockholders, the stock in the two new companies, The Arrow Manufacturing Company and The H. & H. Electric Company, and to surrender that stock on behalf of the stockholders in exchange for shares of the merged or consolidated corporation which "it is expected will be organized before the close of the year." (R. 64–65, 67; Com. Ex. 46.)

The special meeting of the stockholders of Arrow-Hart & Hegeman, Inc., was held as scheduled on December 6, 1928. (R. 68–75; Com. Ex. 48.) The stockholders voted to adopt the plan of reorganization approved by the directors on November 30, 1928, and voted that the consolidated corporation should be permitted to adopt as its name "The Arrow-Hart & Hegeman Electric Company." (R. 72, 74.) The entire vote of the stockholders at this meeting was made by the proxies which had been forwarded to the stockholders with the letter of December 1, 1928. (R. 74, 75.)

On the same day, December 6, 1928, the original respondent, Arrow-Hart & Hegeman, Inc., transferred the common stock of The Arrow Electric Company to The Arrow Maufacturing Company in exchange for all of its shares of stock and transferred the common stock of The Hart & Hegeman

Manufacturing Company to The H. & H. Electric Company in exchange for all of its shares of stock. (R. 77.) The shares of the two new companies, consisting in each case of 200,000 shares of a par value of $5 each, were issued in the name of the stockholders of the original respondent, Arrow-Hart & Hegeman, Inc., (of which company there were outstanding 200,000 shares of a par value of $10 each), so that each stockholder of the original respondent received for each share of stock held by him one share in each of the two new companies. (R. 147–148, 189–190.)

On December 10, 1928, as scheduled, another special meeting of the stockholders of the original respondent, Arrow-Hart & Hegeman, Inc., was held, at which the stockholders confirmed the vote of the directors to terminate the corporate existence of the original respondent and authorized the filing of a preliminary certificate of dissolution.[4] (R. 76–79; Com. Ex. 49, 57.) As in the case of the special meeting of the stockholders of the original respondent held on December 6, 1928, the entire vote of the stockholders at the meeting of December 10, 1928, was made by proxies. (R. 79, 80.)

On December 11, 1928, special meetings of the directors of the two manufacturing companies, The Arrow Electric Company and The Hart & Hegeman Manufacturing Company, and of the two

[4] Final certificate of dissolution was filed April 11, 1929. (R. 81; Com. Ex. 58.)

new holding companies, The Arrow Manufacturing Company and The H. & H. Electric Company, were held, and the agreement of consolidation was approved and signed by the directors. (R. 84–86, 102–104, 151–152, 192–194.) On December 31, 1928, at special meetings of the stockholders of these four corporations, the agreement of consolidation was ratified and approved. (R. 92–96, 109–113, 152–156, 194–198.) At the meeting of the stockholders of the two new holding companies the entire vote was cast by the same persons, as proxies, who had acted as proxies for the stockholders of Arrow-Hart & Hegeman, Inc., the original respondent, at the meetings on December 6 and December 10, 1928.[5] (R. 157, 199, 75, 80.) The entire vote of the preferred stock at the meetings of the stockholders of the two manufacturing companies was also cast by these same persons, as proxies. (R. 100, 115.) At the meeting of the stockholders of The Arrow Electric Company its

[5] The form of proxy issued for the meeting on December 6, 1928, of the stockholders of the original respondent authorized the persons named to vote "on all shares in the new corporations * * * upon all questions which may come before any meeting or meetings of such corporations to be held prior to April 1, 1929, and especially to vote in favor of all resolutions at such meeting or meetings which may be offered for the purpose of effecting a merger or consolidation of such new corporations with The Arrow Electric Company and The Hart & Hegeman Manufacturing Company, or of any of them, in pursuance of the plan of reorganization and exchange of shares which may be adopted at the meeting of Arrow-Hart & Hegeman, Inc., on December 6, 1928." (Com. Ex. 46.)

common stock was voted by Edward R. Grier, as authorized agent of the Arrow Manufacturing Company (R. 99), and at the meeting of the stockholders of The Hart & Hegeman Manufacturing Company its common stock was voted by Samuel P. Williams, as authorized agent of The H. & H. Electric Company (R. 114).

The agreement of consolidation was approved by the Secretary of State of Connecticut on December 31, 1928 (R. 217), and a new corporation, The Arrow-Hart & Hegeman Electric Company, the petitioner herein, came into being. The petitioner issued capital stock of $5,228,300, consisting of 200,000 shares of common stock of a par value of $10 each, and 32,283 shares of preferred stock of a par value of $100 each. Pursuant to the consolidation agreement petitioner issued 18,950 shares of preferred stock in lieu of the preferred stock of The Arrow Electric Company (18,950 shares) and 13,333 shares of preferred stock in lieu of the preferred stock of The Hart & Hegeman Manufacturing Company (13,333 shares); it issued 100,000 shares of its common stock in lieu of the capital stock of The Arrow Manufacturing Company (200,000 shares) and 100,000 shares of its common stock in lieu of the capital stock of The H. & H. Electric Company (200,000 shares). No shares of the petitioner were issued in lieu of the common stocks of The Arrow Electric Company or The Hart & Hegeman Manufacturing Company. (R. 200–212.)

As the plan of reorganization was actually carried out, the stockholders of the original respondent at no time received possession of the shares of stock of the two new holding companies but simply submitted their shares after January 1, 1929, to a transfer agent, who delivered to them a like number of shares in petitioner after stamping their certificates for shares in the original respondent as follows:

THIS CERTIFIES

That the holder hereof has assented to the Plan of Reorganization adopted by the stockholders; and that under such Plan Arrow-Hart & Hegeman Incorporated has distributed all its assets and voted to terminate its corporate existence, and there has been issued to the holder hereof a certificate for the same number of shares of The Arrow-Hart & Hegeman Electric Company in full settlement of all his rights under such Plan.

ARROW-HART &
HEGEMAN, *Incorporated.*
S. P. WILLIAMS, *Treasurer.*

(R. 336, 590–591; Com. Ex. 66.)

The directors of the original respondent constituted the entire first board of directors of petitioner. (Com. Ex. 36, 37, 51; R. 200, 86.) The officers of the original respondent became the officers of petitioner, assuming precisely the same offices held by them in the original respondent. (Com. Ex. 30, 62; R. 431.) The common stockholders of petitioner on January 1, 1929 were iden-

tical with those of the original respondent on November 30, 1928. (Com. Ex. 65, 96; R. 958.) At the first meeting of the board of directors of petitioner on January 1, 1929 a dividend was declared out of the earnings of the two manufacturing companies, payable to common stockholders of petitioner when and as they converted their shares of stock in the consolidating corporations into common stock of petitioner and evidenced their consent to the plan under which the consolidation had been effected. (Com. Ex. 62.)

Although the original respondent had been advised by the Federal Trade Commission in April, 1928, that a merger of the two manufacturing companies would not oust the Commission of jurisdiction (R. 955–956), the Commission was not notified of the plan of reorganization until after it had been consummated by the formation of petitioner. (R. 955–958, 221–222.)

SUMMARY OF ARGUMENT

I. Section 7 of the Clayton Act prohibits the acquisition by a corporation of the stock of two or more corporations where the effect may be to substantially lessen competition between the corporations whose stock is acquired. In October, 1927, the original respondent acquired all of the voting stock of both manufacturing corporations. The Commission's finding of substantial competition between the two corporations in October, 1927, is fully supported by the testimony. The effect of

the acquisition by the original respondent of their voting stock was to eliminate all competition between them.

II. The public injury at which Section 7 is aimed is the probable substantial lessening of competition between two corporations. *International Shoe Company* v. *Federal Trade Commission*, 280 U.S. 291, 298; *Standard Fashion Company* v. *Magrane-Houston Company*, 258 U.S. 346, 357. In view of this legislative intent, it is not necessary for the Commission to find any other public injury in order to hold the stock acquisition unlawful. Nor is it material that certain economies are alleged to have resulted from such acquisition, or that the achievement of economies is claimed to have been the motive therefor. *United Shoe Machinery Corporation* v. *United States*, 258 U.S. 451, 462; *Aluminum Co. of America* v. *Federal Trade Commission*, 284 Fed. 401, 408, certiorari denied, 261 U.S. 616.

III. After the Commission issued its complaint the original respondent, by means of its illegal stock control, caused petitioner to be created by the consolidation of the two manufacturing corporations. The purpose of the consolidation was to oust the Commission of its jurisdiction. All of the directors, officers, and stockholders of the original respondent became the directors, officers and voting stockholders of petitioner. Under Section 11 of the Clayton Act, "read in the light of its gen-

eral purpose and applied with a view to effectuate such purpose," the Commission had jurisdiction to join petitioner, as a party respondent, in the pending proceeding and to order petitioner to divest itself of the assets of one or the other of the manufacturing corporations. *Federal Trade Commission* v. *Western Meat Company*, 272 U.S. 554, 559. Unless this be true, the Commission has no power to enforce compliance with this provision of the Clayton Act.

ARGUMENT

I

THE FEDERAL TRADE COMMISSION'S FINDING THAT THE EFFECT OF THE ACQUISITION BY ARROW-HART & HEGEMAN, INC., IN OCTOBER 1927 OF ALL OF THE VOTING STOCK OF THE TWO MANUFACTURING CORPORATIONS MAY BE TO SUBSTANTIALLY LESSEN COMPETITION BETWEEN THEM IS SUPPORTED BY THE TESTIMONY

Section 7 of the Clayton Act condemns the acquisition by a corporation of all or part of the stock of two or more corporations engaged in interstate commerce where the effect "may" be to substantially lessen competition between the corporations whose stock is acquired.

With the Commission's finding that the two manufacturing corporations were in substantial competition at the time of the stock acquisition, petitioner does not seriously quarrel.[6] The uncon-

[6] Petitioner states that one company was known for its socket line and the other for its switch line. (Petitioner's brief, p. 5.) The evidence, however, establishes that they actively competed in both lines. (R. 310, 377–378, 393–412, 416–417.)

troverted evidence on this point is full and conclusive.

In October, 1927, both corporations manufactured and sold standard electrical wiring devices known as "shelf goods." Such products were similar in design, quality and price, and were sold in the same territories, to the same class of trade and by the same method of solicitation. It was testified by the general manager and vice president of petitioner that about 59 percent of the Hart & Hegeman business was competitive with all of the Arrow business in 1927, considering "the nature of the product" sold and the "system of distribution." (R. 559–560.) Both corporations maintained branch sales offices or commission men in the same cities. Approximately 25 percent to 30 percent of the customers of each were common to both. Counsel for petitioner did not in fact dispute at the trial that the companies "were in full and complete and free competition on their shelf catalog goods" at the time of the stock acquisition (R. 539, 656), and petitioner's witnesses testified to such competition (R. 699, 925). In its brief petitioner admits that "With respect to their shelf goods, the two companies were in competition" and that all the goods manufactured by The Arrow Company were shelf goods. (Brief, pp. 5–6.)

In 1927 the total sales of The Arrow Electric Company were $3,849,000 and of The Hart & Hegeman Manufacturing Company, $4,537,000. Their combined sales in that year exceeded 25 percent of

the total volume of sales of all the manufacturers of electrical wiring devices in the United States. Petitioner was shown to be the largest producer in the United States of electrical wiring devices. Thus, not only was there substantial competition between the two corporations, but each controlled a substantial portion of the total business and together they assumed a dominant position in the industry.

The acquisition by Arrow-Hart & Hegeman, Inc., the original respondent, of the voting stocks of the two manufacturing corporations put an end to all competition between them. Control of the policies of both companies now rested in the officers and directors of the original respondent. It had the power to, and it did, designate the persons who should be qualified to act on its behalf as directors of the two companies. It issued proxies to its officers authorizing them to vote the stock which it held in these companies. Each of the manufacturing corporations had issued preferred stock shortly before the acquisition of the common stock by the original respondent. The preferred stock was non-voting except on six consecutive defaults of quarterly dividends. The earnings of the two companies were more than ample to pay preferred dividends, and they had never defaulted. (R. 928–929, 275, 424.) Thus the acquisition of the common stock gave the original respondent complete control over the two companies.

Petitioner does not deny that this control soon made itself felt in an extensive unification of the production policies of the two corporations. (Petitioner's brief, pp. 16–17; R. 252, 308–309, 348, 422, 441–442.) But it is insisted that because separate sales organizations were maintained for the two corporations, the competition previously existing was undisturbed. This conception of competition is wholly false. Competition does not consist merely of a rivalry between salesmen or sales organizations. The ability of a manufacturing plant to put out a product which the consuming public will find superior to that of a competing corporation is, we venture to state, an important element in the competition between the two companies. This element was eliminated upon the pooling of the manufacturing and engineering resources of the two corporations.

Section 7 of the Clayton Act is concerned with competition between *corporations*.[7] The original

[7] Petitioner insists that competition has been preserved even after the two corporations ceased to exist as corporate entities upon their consolidation into petitioner. (R. 482.) Of course, this is impossible. The evidence moreover establishes that there has been a considerable consolidation of the two sales organizations since the formation of petitioner. Petitioner has placed the sales divisions under the same executive head (R. 531–532); the branch offices of both divisions have been placed under joint managers (R. 383–391, 532–534); and in some territories the same salesmen represent both divisions (R. 860–862, 965–966). No price, credit, or other inducements are offered by salesmen of one division to obtain business from the other. (R. 659, 816–820, 910, 913.)

respondent had acquired all the common stock of both manufacturing corporations. Five of the nine directors of the original respondent came from financial institutions, and of the four remaining directors two came from each of the manufacturing corporations. (R. 307.) While the directors who were also on the board of one of the manufacturing corporations might have been anxious, as a matter of "pride" (petitioner's brief, p. 15), that that corporation should make a better showing than the other one, it is hardly likely that these gentlemen, and certainly inconceivable that the five directors who came from financial institutions, would have permitted the rivalry between the two sales organizations to be carried to the point where the financial condition of either manufacturing corporation might be impaired. As this Court stated in *United States* v. *Union Pacific Railroad Company*, 226 U.S. 61, 87:

> The inducement to maintain these points of advantage—low rates, superiority of service and accommodation—did not remain the same in the hands of a single dominating and common ownership as it was when they were the subjects of active promotion by competing owners whose success depended upon their accomplishment.

See also *Northern Securities Co.* v. *United States*, 193 U.S. 197, 326–327.

Petitioner states (brief p. 44) that Congress "was concerned not with the power, potential or

otherwise, which might vest in [the holding company] but rather with the question of whether that power was aimed at, and would probably bring about, a substantial lessening of competition." But it was precisely that "power, potential or otherwise" with which Congress was concerned, and it was the difficulty of establishing precisely those facts which petitioner now insists are essential, namely the purpose of the transaction and the actual lessening of competition, which Congress was particularly anxious to obviate. For this reason, the words "may be" were substituted in the statute for the word "is." (*Infra*, p. 32, note; 51 Cong. Rec., Pt. 14, p. 14464.) The purpose was to "reach" stock acquisitions "in their incipiency" before the evils at which the statute was aimed had actually been brought about, and to prevent such acquisitions "as would under the circumstances disclosed probably lessen competition" between the corporations whose stock had been acquired. See *Standard Fashion Company* v. *Magrane-Houston Company, supra*, pp. 356–357.

Temple Anthracite Coal Company v. *Federal Trade Commission*, 51 F. (2d) 656 (C.C.A. 3d), lends no support to petitioner's contention. In that case the court concluded that there was no evidence to support the Commission's finding that the corporations concerned were in substantial competition with each other at the time of the stock acquisition. The court stated (p. 660):

> There is no fact found or evidence to show that there was, prior to the acquisition of the stock, actual direct competition between the Temple Anthracite Company and the East Bear-Ridge Coal Company.

The Commission found also that the stock acquisition had the tendency of creating a monopoly in the industry. It is submitted that the acquisition of control by a holding company of two corporations which together do 25 percent of the business of an industry, creates such a tendency. This finding was, however, not essential to the Commission's determination that the acquisition was unlawful. Under Section 7 the Commission could rest its conclusion either on this finding or on its finding as to the probable substantial lessening of competition between the two corporations.

II

THE FEDERAL TRADE COMMISSION WAS NOT REQUIRED, IN ORDER TO HOLD SUCH STOCK ACQUISITION A VIOLATION OF SECTION 7 OF THE CLAYTON ACT, TO FIND ANY INJURY TO THE PUBLIC OTHER THAN THE PROBABLE SUBSTANTIAL LESSENING OF COMPETITION BETWEEN THE TWO MANUFACTURING CORPORATIONS

Petitioner contends that the Commission's finding as to the substantial lessening of competition between the two manufacturing corporations was not a sufficient basis for its conclusion that the acquisition of their stocks constituted a violation of Section 7 of the Clayton Act. It is urged that this section condemns only those acquisitions which injuriously affect the public by an actual threat of

monopoly or restraint, that is to say, which satisfy the test that this Court has applied in cases arising under the Sherman Act.

If this be true, it follows that Section 7 of the Clayton Act added nothing to the Sherman Act. This was obviously not the intention of Congress. By the Clayton Act, as its provisions and legislative history demonstrate, certain specifically defined practices were prohibited irrespective of whether they were violations of the Sherman Act. See Henderson, Federal Trade Commission, p. 27; 51 Cong. Rec., Pt. 16, p. 16144. As this Court stated in *Standard Fashion Company* v. *Magrane-Houston Company, supra* (pp. 355–356):

> The Clayton Act, as its title and the history of its enactment disclose, was intended to supplement the purpose and effect of other anti-trust legislation, principally the Sherman Act of 1890. The latter act had been interpreted by this court to apply to contracts, combinations and conspiracies which unduly obstruct the free and natural flow of commerce.
>
> * * * As the Sherman Act was usually administered, when a case was made out, it resulted in a decree dissolving the combination, sometimes with unsatisfactory results so far as the purpose to maintain free competition was concerned.
>
> The Clayton Act sought to reach the agreements embraced within its sphere *in their incipiency,* and in the section under

> consideration to determine their legality by *specific tests of its own* which declared illegal contracts of sale made upon the agreement or understanding that the purchaser shall not deal in the goods of a competitor or competitors of the seller, which may "substantially lessen competition or tend to create a monopoly." (Italic ours.)

In *United Shoe Machinery Corporation* v. *United States, supra*, the same practices which had been held by this Court not to violate the Sherman Act (247 U.S. 32) were condemned under Section 3 of the Clayton Act. This Court stated (pp. 459–460):

> The Sherman Act and the Clayton Act provide different tests of liability. This was determined in the recent case of *Standard Fashion Co.* v. *Magrane-Houston Co., ante,* 346. In that case we pointed out that the Clayton Act was intended to supplement the Sherman Act, and within its limited sphere established its own rule.

The language of Section 7 itself affords a conclusive answer to petitioner's contention. This section prohibits a corporation from acquiring stock in two or more corporations where the effect of such acquisition "may be (1) to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, *or* (2) to restrain such commerce in any section or community, *or* (3) tend to create

a monopoly of any line of commerce." (Italics and numerals ours.) The acquisition is thus made illegal if it may have any one of the three forbidden effects. See *Aluminum Company of America* v. *Federal Trade Commission, supra*, p. 407. *Swift & Company* v. *Federal Trade Commission*, 8 F. (2d) 595, 597, reversed on other grounds, 272 U.S. 554.

The legislative history of Section 7,[8] demonstrates equally as conclusively that the substantial lessening of competition between two or more corporations which might result from the acquisition of their stocks by a holding company was an evil sought to be curbed by that section, and that such lessening of competition was deemed to be injuri-

[8] The legislative history of this section was carefully reviewed in a recent opinion of the Federal Trade Commission (*Federal Trade Commission* v. *Vanadium-Alloys Steel Company*, January 12, 1934) to which attention of the Court is respectfully invited. We quote the following language from that opinion:

"The legislative history of this section leaves no doubt as to its purport. Its origin is traceable beyond the initiation of the legislation itself—to the program of a great political party. Upon the accession of that party to power, this program was made concrete by legislation. The records of the House and the debates the section evoked, however, demonstrate that an evil sought to be curbed by the section was that of corporate holding of corporate stocks to effect a merger that would lessen competition that might otherwise be substantial. Avowedly the purpose was to go beyond the criteria of the Sherman Law; the real fear was that the language chosen might relax the requirements of that act. In the Senate these objections were made even more apparent. Fear of restrictive judicial interpretation of the section was

ous to the public although it would involve no tendency to monopoly or restraint of trade.

In *International Shoe Company* v. *Federal Trade Commission, supra,* it appeared that the products of the two companies concerned were different "in appearance and workmanship, appealed to the tastes of entirely different classes of consumers," were "in the main" sold to different classes of dealers, and found their way "into distinctly separate markets." (Pp. 296–297.) Materially less than 5 percent of each company's product was sold in competitive markets. (Pp. 298–299.) Moreover, the company whose stock was acquired was faced with financial ruin. Thus, not only was there no substantial competition between the two corporations, but there was no probability

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pronounced. In order that the proof that the acquisition of such stock resulted in the lessening of competition between the two corporations might not be too difficult, and that potential as well as actual lessening of competition would satisfy the requirements of the statute, the Senate by one amendment substituted the words 'may be' for 'is', and by another eliminated the qualifying term 'substantially'. The restoration of this qualification in conference was not deemed to cut down upon the force of the rule that 'will save the little man, and yet it will reach the people who are trying to break up their competitors.' At no time in the course of these legislative proceedings was there any thought that more than a substantial lessening of competition was needed to be proven in order to warrant the issuance of an order compelling a corporation to divest itself of the stock of another corporation, nor was there any suggestion that 'substantial' competition was that type of competition whose lessening or elimination would tend to monopoly or result in restraint of commerce in the products involved."

of future competition between them. This Court, therefore, held that the stock acquisition did not violate Section 7. It was stated (p. 298):

> Mere acquisition by one corporation of the stock of a competitor, even though it result in some lessening of competition, is not forbidden; *the act deals only with such acquisitions as probably will result in lessening competition to a substantial degree, Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, 357; *that is to say, to such a degree as will injuriously affect the public.* Obviously, such acquisition will not produce the forbidden result if there be no pre-existing substantial competition to be affected; for the public interest is not concerned in the lessening of competition, which, to begin with, is itself without real substance. (Italics ours.)

This Court thus holds that the public injury with which Section 7 is concerned is the probable substantial lessening of competition between two corporations. That this is the true significance of the above quoted language is made plain if the second sentence [9] is stated conversely as follows:

> Obviously, such acquisition will produce the forbidden result if there be pre-existing substantial competition to be affected; for the public interest is concerned in the lessen-

[9] Concerning this sentence, the court below said: "The converse is true and if there is real substance in the competition, the public interest is affected." (R. 1066–1067.)

> ing of competition, which, to begin with, is of real substance.

Had this Court been confronted in that case, as it is here, with two solvent corporations in substantial competition with each other, there can be little doubt that this Court would have found the stock acquisition to be a violation of Section 7.

Petitioner asserts that certain economies have been achieved by reason of the stock acquisition. But Congress has declared that the substantial lessening of competition between two corporations is an evil, and in view of this declared legislative intent it cannot be material that certain benefits are claimed to have resulted from the elimination of such competition. In *United Shoe Machinery Corporation* v. *United States, supra,* this Court stated (p. 462):

> * * * there is much testimony in the record tending to show that it was the excellence of the United Company's machinery and the efficiency of its service which induced lessees to acquire its machinery, but these considerations are apart from the pertinent issues which here confront us. No matter how good the machines of the United Company may be, or how efficient its service, it is not at liberty to lease its machines upon conditions prohibited by a valid law of the United States. Congress has undertaken to deny the protection of patent rights to such covenants as come within the terms of the

> Clayton Act, and if the statute is constitutional, the sole duty of the court is to enforce it in accordance with its terms.

Petitioner contends that the motive for organizing the original respondent was not to lessen competition between the manufacturing corporations but to achieve economies and to meet the emergency caused by the death of Shiras Morris, the active head of one of the companies. There was evidence, however, that Morris had himself endeavored to bring about a merger (R. 271–273; Com. Ex. 1, 17, 18); and that at least one motive for the organization of the original respondent was because "competition was growing more and more severe" (R. 273, 278). In any event, the motive of the transaction is entirely immaterial. A similar defense was interposed in *Aluminum Co. of America* v. *Federal Trade Commission, supra.* The court stated (p. 408):

> In addition to the several defenses made by the Aluminum Company there is much in the record to the effect that the need of aluminum for purposes of war and the assistance rendered the allied governments and our own government by increasing production and maintaining reasonable prices entered into the transaction. For these reasons and others it is persuasively urged that the arrangement was not a device intended to get around the Clayton Act but was a plain business transaction having the

twofold object of relieving one party from a difficult business situation and enabling the other party to meet more effectively the demands of war. *With these matters, we surmise, we have no present concern. They have to do with the motive for the transactions. We have to do only with the "effect" of the transaction; and with its effect only as it may "substantially lessen competition * * * or restrain commerce, * * * or tend to create a monopoly."* As we are not called upon to determine whether the Aluminum Company is a monopoly within the definition of the Anti-Trust Law (Comp. St. Sec. 8820 et seq.), we limit our decision to the question whether, within the policy of the Clayton Act, the transaction comes within the definition of the section. In this we are of opinion that it does, and that its effect upon actual competition as well as in destroying potential competition in a way later to make actual competition impossible was substantially to lessen competition between the corporation whose stock was acquired and the corporation making the acquisition; and second, that without regard to whether its effect was substantially to lessen competition between these two corporations, the stock acquisition did, in effect, "tend to create a monopoly." (Italics ours.)

III

AFTER THE ISSUANCE OF THE COMPLAINT THE ORIGINAL RESPONDENT, BY MEANS OF ITS UNLAWFUL STOCK CONTROL, CAUSED PETITIONER TO BE CREATED BY THE CONSOLIDATION OF THE MANUFACTURING CORPORATIONS, AND THE FEDERAL TRADE COMMISSION, THEREFORE, HAD JURISDICTION TO JOIN PETITIONER AS A PARTY RESPONDENT AND TO ORDER IT TO DIVEST ITSELF OF THE ASSETS OF ONE OR THE OTHER OF THE TWO FORMERLY COMPETING COMPANIES

Section 11 of the Clayton Act provides that if the Commission finds that any of the provisions of Section 7 have been, or are being violated, "it shall * * * issue * * * an order requiring" the offending corporation "to cease and desist from such violations, and divest itself of the stock held * * * in the manner and within the time fixed by said order." The Commission is thus given the broad power to make an order to cease and desist "from such violations," and is plainly not limited to an order for the divestiture of *stock*. This Court clearly intimated in *Thatcher Manufacturing Company* v. *Federal Trade Commission*, 272 U.S. 554, 560, and *Swift & Company* v. *Federal Trade Commission*, 272 U.S. 554, 561, that the Commission has power to order the divestiture of *assets* obtained after the issuance of a complaint through the use of stocks acquired in violation of Section 7, and the Commission's jurisdiction to make such an order was affirmatively upheld in *International Shoe Company* v. *Federal Trade Commission*, 29 F. (2d) 518, reversed on other grounds, 280 U.S. 291. See also *Federal Trade*

Commission v. *Eastman Kodak Company*, 274 U.S. 619, 626.

Petitioner contends, however, that the order in the present case exceeded the Commission's jurisdiction although the assets were acquired after the issuance of the complaint. In support of this contention petitioner asserts (1) that "as a matter of law, the holding company [the original respondent] did not organize the petitioner," (petitioner's brief, p. 51) and (2) that even assuming that petitioner was organized by the original respondent, the Commission was nevertheless without jurisdiction to issue an order against the petitioner (petitioner's brief, p. 47).

(1) The steps by which petitioner was created are set forth fully in our statement. (*Supra*, pp. 11–21.) The conclusion tobe drawn from these facts is a clear one. The original respondent for the sole purpose of ousting the Commission of its jurisdiction determined to bring about a consolidation of the two manufacturing corporations. Its control of the stock of these corporations was the means by which it carried this plan into execution.

On November 10, 1928, the directors of the original respondent voted to recommend its dissolution and promised that details of a consolidation of the two manufacturing corportions would be sent to the stockholders for their approval. On November 30, 1928, the directors adopted in detail the entire plan subsequently carried out, including not only

the transfer of the stock of the two manufacturing corporations to the two new holding companies, but also the formation of petitioner by the consolidation of these four corporations. On the following day, the original respondent announced this plan to its stockholders, stating that " These separate steps, as a part of one plan of reorganization * * * are desirable * * * to meet the criticism of the Federal Trade Commission * * * " (R. 65). Without waiting for authority from the stockholders, officers and directors of the original respondent proceeded to organize the two new holding companies, became their officers and directors, and as holders of practically all their stock, voted on December 1, 1928 to adopt the entire plan of reorganization. These companies were created solely for the purpose of holding the common stock of the manufacturing corporations until the consolidation could be consummated. On December 6, 1928, the stockholders of the original respondent adopted the entire plan for the formation of petitioner. Prior to this meeting proxies had been procured from the stockholders authorizing the persons named not only to receive the stock of the two new holding companies, but to vote that stock in favor of the consolidation. The proxies contained the express consent of the stockholders to such plan of reorganization as the proxies named should agree to. (Com. Ex. 46.) These persons had been selected by the directors of the original

respondent. (R. 958.) At the meetings of the stockholders of the four companies on December 31, 1928, at which the consolidation was consummated, these same persons, as proxies, cast the vote of the preferred stockholders of the two manufacturing corporations as well as that of the stockholders of the two holding companies. The common stock of the manufacturing corporations was voted by the holding companies, but the actual vote was made on their behalf by Edward R. Grier, president, and Samuel P. Williams, vice president and treasurer, of the original respondent.

Although the original respondent stated to its stockholders that the plan adopted was necessary to meet the criticism of the Federal Trade Commission, it is apparent that no serious effort was made by the original respondent to comply with Section 7 of the Clayton Act. The stock of the two manufacturing corporations was transferred to the newly created holding companies only after proxies had been procured from the stockholders of the original respondent authorizing the consolidation. Shares in both of the new holding companies were issued to each stockholder of the original respondent. Thus, during the existence of the holding companies, the stockholders of the original respondent retain their common interest in the stock of the two manufacturing corporations. As the plan was actually carried out the common stock of petitioner was exchanged, share for share, for the stock of the original respondent.

Petitioner was organized by the individuals who were in complete control of the original respondent. All of the officers, directors and stockholders of the original respondent became the officers, directors and voting stockholders [10] of petitioner. The persons in control of the original respondent, for the purpose of ousting the Commission of its jurisdiction, caused petitioner to be created and the assets of the manufacturing corporations to be transferred to it, with the result that these same persons have now assumed precisely the same control over petitioner as they exercised over the original respondent and the two manufacturing corporations. It is apparent that petitioner is finding its main support in the fertile fiction of the corporate entity. It is said that the original respondent was dissolved [11] and, therefore, could not exercise control over the formation of petitioner. It is urged that the two newly created holding companies and the two manufacturing corporations were free to consolidate or not as they saw fit. It is urged finally that petitioner did not itself acquire stock in violation of Section 7 of the Clayton Act. That identically the same persons were in control of each of these corporations, petitioner apparently does not deem to be material. This Court should not permit

[10] The preferred stock of petitioner is non-voting except upon default in six quarterly dividends. (R. 203.)

[11] Of course, the original respondent did not cease to exist as a corporate entity until the final certificate of dissolution was filed—April 11, 1929. (R. 81, Com. Ex. 58.)

the fiction of corporate entity to be thus misused and should hold that petitioner is answerable for the wrong of those who, by means of their control over the original respondent, the two holding companies and the two manufacturing corporations, created petitioner and now control it. See *People* v. *North River Sugar Refining Company*, 121 N.Y., 582, 615–622.

It must be clear, in any event, that the two holding companies which were created for the sole purpose of holding the unlawfully acquired stock of the manufacturing corporations were subject to the same duty, as was the original respondent, to comply with Section 7 of the Clayton Act. The statute under which petitioner was created by the consolidation of these two holding companies and of the two manufacturing corporations provides that

> * * * all debts, liabilities and duties of either of such consolidating corporations shall thenceforth attach to the consolidated corporation, and may be enforced against it to the same extent as if they had been incurred or contracted by it. (R. 219–220.)

It follows, therefore, that the duty to comply with Section 7 of the Clayton Act, to which the two holding companies were subject, attached to petitioner "and may be enforced against it."

Petitioner stresses the fact that the vote of two-thirds of the preferred stock of the manufacturing corporations was required in order to consummate the consolidation. The whole plan, however, was

conceived by the officers and directors of the original respondent. Their control of both manufacturing corporations enabled them to propose the consolidation to the preferred stockholders and to induce them to give their proxies authorizing it. It is significant that sufficient proxies were obtained within the brief space of twenty days. The fact that the preferred stockholders were advised that their interests would remain substantially the same after the consolidation [12] and the further fact that both corporations had been placed under the joint control of the original respondent, so that the consolidation would involve no change in their management, explain, no doubt, why the preferred stockholders were so easily induced to give their proxies.

[12] The letter by which the preferred stockholders were given formal notice of the consolidation was issued on December 11, 1928. It was signed by Edward R. Grier, president of The Arrow Electric Company and Samuel P. Williams, president of The Hart & Hegeman Manufacturing Company, and it was addressed to the preferred stockholders of both companies. The letter read in part as follows: "The terms of preference of such preferred stock will be substantially the same as those of the preferred shares you now hold, whether of The Arrow Electric Company or of The Hart & Hegeman Manufacturing Company, as the terms of these two issues have always been substantially identical. * * * The law requires a vote of two-thirds of each class of stock of each of the four companies and it is essential, therefore, that you sign and return the inclosed proxy promptly to Hartford National Bank and Trust Company." (Com. Ex. 52.)

Moreover, the original respondent and its stockholders actually controlled more than two-thirds of The Hart & Hegeman Manufacturing Company preferred stock and controlled almost two-thirds of the preferred stock of The Arrow Electric Company. The outstanding preferred stock of The Hart & Hegeman Manufacturing Company was 13333 shares of which 8889 shares were needed in order to approve the consolidation. (R. 113.) The common stockholders of the original respondent owned 5103 shares of the preferred stock of The Hart & Hegeman Manufacturing Company (Appendix B, *infra*). The Arrow Electric Company owned 3775 shares (Com. Ex. 70), and The Hart & Hegeman Manufacturing Company owned 50 shares (Com. Ex. 70), making a total of 8928 [13] shares or 39 shares in excess of the necessary two-thirds. The outstanding preferred stock of The Arrow Electric Company was 18950 shares of which 12634 were required to vote the consolidation. (R. 95.) The common stockholders of the original respondent owned 3717 shares of the preferred stock of The Arrow Electric Company (Appendix C, *infra*), The Hart & Hegeman Manufacturing Company owned 6260 shares (Com. Ex. 71) and The Arrow Electric Company owned 18 shares

[13] 465 additional shares were owned by Henry T. Paiste (Com. Ex. 70), head of H. T. Paiste Co., a subsidiary plant of The Hart & Hegeman Manufacturing Company which was closed shortly after the formation of the original respondent. (R. 308–309.) Mr. Paiste, of course, knew of the formation of the original respondent. (Com. Ex. 15.)

(Com. Ex. 71), making a total of 9995 [14] shares or 2639 shares less than the required two-thirds. It thus appears that the original respondent and its stockholders were short of actual control of the vote of the preferred stockholders of both manufacturing companies by only some 2600 shares of the preferred stock of The Arrow Electric Company.

The minutes of the meetings at which the consolidation was voted make it clear, moreover, that the preferred stockholders were fully informed before they voted as to all of the steps which the original respondent had taken to bring about the consolidation. (R. 93–94, 110–112.) All of the proxies [15] who represented the preferred stockholders at these meetings were also common stockholders of the original respondent and thus had received actual notice that the plan had been adopted "to meet the criticism of the Federal Trade Commission." (R. 65.) Moreover, as proxies for the stockholders of the original respondent, these individuals participated in the plan at the meetings of

[14] 75 additional shares were held by the Phoenix State Bank and Trust Company, as trustee. (Com. Ex. 71.) George H. Burt, a director of the original respondent, was chairman of the board of this bank. (Resp. Ex. 36.)

[15] L. P. Broadhurst, William R. C. Corson, Joseph R. Ensign, Philip B. Gale, John O. Enders, and Robert B. Newell. (R. 100, 115; Com. Ex. 65.) Of these, Broadhurst, Gale, and Enders were also preferred stockholders of one or both of the manufacturing corporations. (Appendices B and C, *infra*.)

the stockholders of the original respondent on December 6 and December 10, 1928, and at the meetings of the stockholders of the two holding companies on December 31, 1928.

In any event, the fact that the consent of the preferred stockholders was required for the consolidation is entirely immaterial. The Commission had exercised its jurisdiction by the issuance of a complaint. Until the Commission had carried to completion its statutory duty to restore the competition previously existing between the corporations, its jurisdiction could not be disturbed. If certain preferred stockholders cooperated, even innocently, with the original respondent in a plan to place the subject matter of the proceeding beyond the control of the Commission, that fact could not operate to oust the Commission of its jurisdiction.

(2) Petitioner's conception of the jurisdiction of the Commission is, however, quite different. For even assuming that the original respondent violated Section 7 by acquiring the stock of the manufacturing corporations and assuming further that the original respondent by means of such stock control caused petitioner to be created and the assets of the two manufacturing corporations to be transferred to it, petitioner contends nevertheless that the Commission had no jurisdiction to issue an order against the petitioner. (Petitioner's brief, pp. 26–27, 51.)

It is thus asserted that a holding company charged with violating Section 7 of the Clayton Act by acquiring stock in two competing corporations, may defeat the jurisdiction of the Commission simply by using its stock control to bring about a consolidation of the two corporations. If this be true, then the Commission has no power to enforce compliance with this provision of the Clayton Act. Under Section 11 of the Act, the Commission may not issue an order until after hearing, and the Commission has no equitable power to preserve the *status quo pendente lite.* See *National Harness Manufacturers' Association* v. *Federal Trade Commission,* 268 Fed. 705, 707 (C.C.A. 6th); *Chamber of Commerce* v. *Federal Trade Commission,* 280 Fed. 45, 48 (C.C.A. 8th).

Federal Trade Commission v. *Western Meat Company, supra,* decided at the same time as the *Thatcher* and *Swift* cases, *supra,* held that the Commission had jurisdiction to prevent stocks acquired in violation of Section 7 from being used to obtain the assets of the corporation whose stocks had been unlawfully acquired. The order which this Court sustained in that case directed that "in such divestment, no stock or property * * * to be divested shall be sold or transferred, directly or indirectly, to any stockholder, officer, director, employee, or agent of, or anyone otherwise directly or indirectly connected with or under the control or influence of, respondent or any of its officers, di-

rectors, or stockholders * * *." (P. 558.) This Court said (p. 559):

> Without doubt the Commission may not go beyond the words of the statute properly construed, *but they must be read in the light of its general purpose and applied with a view to effectuate such purpose.* Preservation of established competition was the great end which the legislature sought to secure.
> * * * The purpose which the lawmakers entertained might be wholly defeated if the stock could be further used for securing the competitor's property. And the same result would follow a transfer to one controlled by or acting for the respondent. (Italics ours.)

It follows from the decision in the foregoing case that the Commission had jurisdiction at the time it issued its complaint to prevent the original respondent from using its illegal stock control to bring about a consolidation of the manufacturing corporations. This jurisdiction is manifestly valueless unless the Commission had the power to extend its jurisdiction to petitioner by joining it as a party respondent. By Section 11 of the Clayton Act, Congress "vested" the Commission with "authority to enforce compliance" with Section 7 of the Act, and outlined in general terms the manner of the exercise of such authority. It must be presumed that in vesting such jurisdiction in the Commission, Congress intended to include at least

those powers without which the authority granted would be a nullity. Otherwise, "the purpose which the lawmakers entertained might be wholly defeated."

Petitioner urges that the order will work a hardship. The order required petitioner within four months to submit a report showing the form and manner of its compliance therewith. (R. 263.) No such report has been submitted. The manner of restoring the previous competitive status of the corporations is not, therefore, now presented to this Court. Petitioner has insisted throughout that the brands of the two corporations have always been marketed separately. (Petitioner's brief, p. 25.) It should therefore, involve no serious inconvenience to divorce the properties of one of the corporations from petitioner.

The Commission's sole concern is to carry out the statutory purpose, "preservation of established competition." It is believed that the ends of the statute can be achieved in this case without material injury to the stockholders. The earnings of *either* of the two corporations have been more than ample to pay the annual dividends on the *entire* preferred stock issue of petitioner.[16] The in-

[16] The authorized preferred stock issue of petitioner is $3,333,300 represented by 33,333 shares of a par value of $100. (R. 202.) This stock is entitled to annual dividends at the rate of 6½ percent per annum. (R. 202.) The total annual dividend requirement for the preferred stock is, therefore, $216,664.50. The net profits of The Arrow Electric Com-

terests of the preferred stockholders do not, therefore, present serious cause for concern. The ultimate end to be accomplished is to restore, so far as possible, the exact status existing before the wrongful acquisition, so that there will be two corporations controlled by separate groups of stockholders, officers and directors. So far as possible, each stockholder of petitioner can be given the same stock interest which he held at the time of the unlawful acquisition. If a stockholder has purchased his stock since the acquisition, it can readily be determined in which corporation he should be given stock by ascertaining the corporation in which the stock which he now owns was held at the time of the acquisition. The proportionate share of the assets to be allocated to each corporation can be determined on the basis of the relative values of their assets at the time of the unlawful acquisition.

CONCLUSION

It is respectfully submitted that the acquisition by Arrow-Hart & Hegeman, Inc., of the common stock of the two manufacturing corporations consfituted a violation of Section 7 of the Clayton Act;

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pany were in 1927, $500,000 and in 1928, $600,000; the net profits of the Arrow division of petitioner were in 1929, $585,000. (R. 928–929.) The net profits of The Hart & Hegeman Manufacturing Company were in 1927, $370,000 and in 1928, $639,000; the net profits of The Hart & Hegeman division of petitioner were in 1929, $768,000. (R. 928–929.)

that petitioner was created and the assets of the manufacturing corporations were transferred to it by means of the control exercised by Arrow-Hart & Hegeman, Inc., over such common stock; that the Federal Trade Commission had power under Section 11 of the Clayton Act to join petitioner as a party respondent in the proceeding then pending against Arrow-Hart & Hegeman, Inc., and to order petitioner to divest itself of the assets of one or the other of the two formerly competing manufacturing corporations; and that, therefore, the judgment below should be affirmed.

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Federal Trade Commission.

FEBRUARY 1934.

APPENDIX A

Sections 7 and 11 of the Clayton Act, c. 323, 38 Stat. 730, 731–732, 734–736 (U.S.C., Title 15, Secs. 18, 21), provide, *inter alia*:

SEC. 7.

* * * * *

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

* * * * *

SEC. 11. That authority to enforce compliance with sections two, three, seven and eight of this Act by the persons respectively subject thereto is hereby vested: in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, banking associations and trust companies, and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:

Whenever the Commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission or board requiring such person to cease and desist from the violation of the law so charged in said complaint. Any person may make application, and upon good cause shown may be allowed by the commission or board; to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission or board. If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order. * * *

If such person fails or neglects to obey such order of the Commission or board while

the same is in effect, the commission or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission or board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission or board. The findings of the commission or board as to the facts, if supported by testimony, shall be conclusive. * * * The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and orty of the Judicial Code.

Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith served upon the commission or board, and thereupon the commission or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the

filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission or board as in the case of an application by the commission or board for the enforcement of its order, and the findings of the commission or board as to the facts, if supported by testimony, shall in like manner be conclusive.

APPENDIX B

Containing a list as of Dec. 31, 1928, of the preferred stockholders of The Hart & Hegeman Manufacturing Co. who were at the same time stockholders of Arrow-Hart & Hegeman, Inc. (Com. Exs. 70, 65, 96)

	Number of preferred shares, The Hart & Hegeman Mfg. Co.	Number of shares, Arrow-Hart & Hegeman, Inc.
Bailey, George H	10	25
Bankers Trust Co., as trustee for various individuals [1]	2,760	100,870
Barnes, Roy T. H. & Co. [2]	10	280
Barney, D. Newton	100	500
Bell, Lucy A	20	15
Broadhurst, Leon P	100	300
Butterworth, Emerson M. and Corwin M	25	100
Campbell, Marion M	5	50
Cooley, Charles P	50	1,000
Cruttenden, Robert S	5	10
Daley, Margaret M	5	19
Davis, J. H. Kelso	36	300
Emory, Grace S. [3]	7	6
Fenn, Mildred Q	20	100
Fitch, Edith C	2	3
Flynn, George W	10	100
Foster, U. D	5	15
Fox, George L	100	230
Gale, Philip B	50	50
Gammon, William B. [4]	20	40
Geutt, Bertha L. [5]	5	100
Guett, Monroe [6]	24	1,050
Guett, Hortense J	41	1,050
Hartford, Connecticut Trust Co., The, trustee [7]	50	6,040
Hartford National Bank & Trust Co., The, trustee for John R. Cook [8]	35	4,200
Humphrey, Harold P	10	850
Hyde, Grace E	3	10
Lydall, Walter E	20	75
McEvoy, Nora J. & Margaret M	20	10
Mather, Arthur	5	20
Mather, Fannie L	5	13
Morris, Grace Root	250	460
Putnam & Co. [9]	33	126
Richards, John L	20	25
Root, Judson H. (Estate of) [9]	250	1,000
Sage, Edwin E	100	6,640
Sayre, Hector E	10	50
Smith, Elizabeth E	2	10
Smith, E. Terry	10	250
Smith, Gertrude D	50	50
Sullivan, Patrick J	3	50
Talcott, Morris H	10	20
Thomson, Adelaide L	100	100
Thomson, Madora W	70	600
Turillo, James J	3	4
Vinton, Paul L	5	10

Footnotes at end of table.

Containing a list as of Dec. 31, 1928, etc.—Continued

	Number of preferred shares, The Hart & Hegeman Mfg. Co.	Number of shares, Arrow-Hart & Hegeman, Inc.
Walker, Anne W. P.	7	1
Weldner, Edith F.	20	10
Weir, Janet M.	15	25
Willard, Harriet E.	3	40
Williams, Bertha McC. C.	15	100
Williams, Clarence B.	10	30
Williams, Dorothy Ely	10	20
Williams, Harry R.	50	125
Williams, Samuel P.[10]	420	4,400
Wood, William R.	75	100
Young, E. Lewis	2	5
Young, Edith E.	2	5
Total	5,103	131,687

[1] The preferred stock of The Hart & Hegeman Manufacturing Company was held as follows:
407 shares for E. Bosworth Grier, Assistant Secretary, The Arrow Electric Company. (R. 213.)
1,653 shares for Edward R. Grier, officer and director of Arrow-Hart & Hegeman, Inc., and of The Arrow Electric Company. (Resp. Ex. 36.)
200 shares for Margaret G. Grier.
500 shares for Benjamin C. Perkins, officer and director of Arrow-Hart & Hegeman, Inc., and of The Arrow Electric Company. (Resp. Ex. 36.)
The stock of Arrow-Hart & Hegeman, Inc., was held as follows:
20,176 shares for E. Bosworth Grier.
20,171 shares for Edward R. Grier.
10,096 shares for Elizabeth C. Grier.
25,216 shares for Charles G. Perkins, an officer and director of The Arrow Electric Company. (Resp. Ex. 36.)
25,211 shares for Benjamin C. Perkins.

[2] One of the syndicate which offered the preferred stock issue of The Hart & Hegeman Manufacturing Company to the public. (Com. Ex. 29.)

[3] Spelled "Emety" in the list of stockholders of Arrow-Hart & Hegeman, Inc. (Com. Ex. 65.)

[4] Spelled "Gammons" in the list of stockholders of Arrow-Hart & Hegeman, Inc. (Com. Ex. 65.)

[5] Spelled "Guett" in the list of stockholders of Arrow-Hart & Hegeman, Inc. (Com. Ex. 65.)

[6] Officer and director of Arrow-Hart & Hegeman, Inc., and an officer of The Hart & Hegeman Manufacturing Company. (Resp. Ex. 36.)

[7] The preferred stock of The Hart & Hegeman Manufacturing Company was held for Roger S. Baldwin. The stock of Arrow-Hart & Hegeman, Inc., was held as trustee under the wills of Alice R. Pease and Edward D. Redfield. Arthur P. Day, a director of Arrow-Hart & Hegeman, Inc., was vice-chairman of the Board of this trust company. (Resp. Ex. 36.)

[8] The stock of Arrow-Hart & Hegeman, Inc., was held in the name of John R. Cook; Mr. Cook was a director of The Hart & Hegeman Manufacturing Company, and an officer and director of the H. & H. Electric Company. (R. 212, 216.)

[9] Mr. Root was a director of The Hart & Hegeman Manufacturing Company. (Resp. Ex. 36.)

[10] Mr. Williams was an officer and director of Arrow-Hart & Hegeman, Inc., and of The Hart & Hegeman Manufacturing Company. (Resp. Ex. 36.)

APPENDIX C

Containing a list as of Dec. 31, 1928, of the preferred stockholders of the Arrow Electric Co. who were at the same time stockholders of Arrow-Hart & Hegeman, Inc. (*Com. Exs. 71, 65, 96*)

	Number of preferred shares, The Arrow Electric Co.	Number of shares, Arrow-Hart & Hegeman, Inc.
Allen, Marjorie H	5	5
Alley, Frank	102	2,000
Andrews, Annie C	5	12
Andrews, Marion B	8	10
Arnold, George W	5	15
Bailey, George H	10	[1] 25
Bankers Trust Co. as trustee for various individuals [2]	1,366	[1] 100,870
Barbour, Cordelia H	35	100
Barney Co., Inc., The D. N	100	870
Barry, Helen T	10	10
Barton, Mary R	20	20
Bill, Charles G	75	200
Broadhurst, Leon P	100	[3] 300
Bulkeley, William E. A	60	100
Butterworth, Emerson M. and Corwin M	25	[1] 100
Carrol, John W [3]	100	50
Chase, Charles E	100	250
Clarke, D. Elizabeth	1	5
Cruttenden, Edna B	5	10
Davock, John	10	30
Don, David	3	4
Enders, John O	50	150
Fehrer, George	10	30
Fenn, Mildred Q	20	100
Flynn, George W	13	100
Fox, Jacob L	25	100
Gale, Philip B	50	[1] 50
Griswold, Allen S	15	15
Hartford (Connecticut) Trust Co., executor [4]	30	[1] 6,040
Hall, Agnes L	50	20
Hall, Frank B	50	200
Hall, Otis B	50	200
Hansel, Harriet D	95	500
Herrmann, Emma W	5	5
Heublein, Inc., G. F	100	400
Jacobs, Ward S	30	100
Livingston, Mabel Edwina [5]	10	50
Loomis, Thomas R	5	15
Lydall, Walter E	15	[1] 75
Mitchell, Margaret S	25	150
Monette, Florence A	10	20
O'Toole, Michael J	10	10
Osborn, Annis A	5	20
Peiler, Max H	57	50
Ragatsky, Mollie	10	10
Redfield, Mary W	20	270
Reidy, David D	30	30
Reynolds, Joseph T	6	20

Footnotes at end of table.

Containing a list as of Dec. 31, 1928, etc.—Continued

	Number of preferred shares, The Arrow Electric Co.	Number of shares, Arrow-Hart & Hegeman, Inc.
Rowley, Clayton W	100	200
Russell, William C	50	50
Scranton, Emily C	50	50
Street, John F	30	100
Stryker, Emily W	20	25
Talcott, Morris H	10	[1] 20
Terrell, Martha T	20	[redacted]
Terry, Leontine H	5	5
Thomson, James L	100	500
Thomson, Madora W	100	[1] 600
Tillotson, Edwin W	3	3
Turnbull, James A	6	20
Webster, William H	10	14
Weigel, Carrie A	10	10
Willard, Harriet E	5	40
Williams, Annie L	5	10
Williams, Clarence B	10	[1] 30
Putnam & Co.[4]	30	[1] 126
Thomson, Fenn & Co.[4]	10	918
Wuskell, Elizabeth C.[7]	2	10
Wyper, Anna S	200	300
	3,717	[8] 116,757

[1] The shares of Arrow-Hart & Hegeman, Inc., held by this stockholder were also listed in Appendix B.

[2] The preferred stock of The Arrow Electric Company was held as follows:

5 shares for Clara M. Glazier.

564 shares for E. Bosworth Grier, Assistant Secretary of The Arrow Electric Company. (R. 213.)

5 shares for Edward R. Grier, officer and director of Arrow-Hart & Hegeman, Inc., and of The Arrow Electric Company. (Resp. Ex. 36.)

287 shares for Margaret G. Grier.

205 shares for Benjamin C. Perkins, officer and director of Arrow-Hart & Hegeman, Inc., and of The Arrow Electric Company. (Resp. Ex. 36.)

300 Shares for Charles G. Perkins, an officer and director of The Arrow Electric Company. (Resp. Ex. 36.)

[3] Spelled "Carroll" in the list of stockholders of Arrow-Hart & Hegeman, Inc. (Com. Ex. 65.)

[4] The preferred stock of The Arrow Electric Company was held as Executor of the Estate of Frederick A. Griswold. Arthur Day, a director of Arrow-Hart & Hegeman, Inc., was vice chairman of the Board of this trust company. (Resp. Ex. 36.)

[5] Listed as M. Edwina Livingston in the list of stockholders of Arrow-Hart & Hegeman, Inc. (Com. Ex. 65.)

[6] One of the syndicate which offered The Hart & Hegeman preferred stock issue to the public. (Com. Ex. 29.)

[7] Listed as Elizabeth Wuskell in the list of the stockholders of Arrow-Hart & Hegeman, Inc. (Com. Ex. 65.)

[8] Of this total 108,236 shares represent shares already listed in Appendix B.

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